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Sec. 8 19
10 19

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 702

AINTREE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. A. 321–332)[1] is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 341–371) are reported in 37 N. L. R. B. 1174.

[1] The record upon this petition consists of the appendix to the Board's brief in the court below, herein referred to as "B. A.," the appendix to the company's brief in the court below, herein referred to as "R. A.," and the record of the supplemental proceedings in the court below, bound into the company's appendix (R. A. 317–340).

JURISDICTION

The decree of the court below (R. A. 336–338) was entered on December 4, 1942. A petition for rehearing was denied on December 4, 1942 (R. A. 336). The petition for a writ of certiorari was filed on February 3, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below, that petitioner dominated, interfered with and supported a labor organization of its employees known as The Better Union, discriminatorily discharged Mina Hale, and in these and other respects interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[2]

2. Whether, under the circumstances of this case, the Board abused its discretion in entering

[2] Petitioner urges the further question, which is not necessarily presented, since the Board's order is adequately supported even if it is answered in petitioner's favor: May the Board take into consideration in reaching its findings of domination, interference, and support the fact that petitioner's foremen and foreladies repeatedly attended meetings of The Better Union.

an order requiring petitioner to cease and desist from "in any other manner" interfering with its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Whether, upon findings that petitioner discouraged membership in a specified labor organization, the Board abused its discretion in entering an order requiring petitioner to post notices stating that its employees are free to become or remain members of the specified organization and that it will not discriminate against employees because of membership or activity in that organization, without adding a statement that the employees are free to join any organization they choose.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 341–371). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

[2] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

The International Ladies' Garment Workers' Union, Local 373, herein called the International, initiated efforts to organize petitioner's employees in September 1940 (B. A. 345; B. A. 16, 52–53). Baker, respondent's production manager, at once made known his opposition to such activities, informing Goldie Manlove, an employee, that union organizers were "only a bunch of racketeers" interested solely in "their dues each week," and that "they" had had the union organizer "up before the judge" on the night before and "threatened to run him out of town" (B. A. 346; B. A. 53–55). In October, shortly after employee Jewell Elliott joined the International, Production Manager Baker approached her as she was talking with several other employees before beginning work and stated that "we had better not catch you talking about it [the union]" (B. A. 347; B. A. 57–58).[4]

Temporary officers of the International were elected on November 7, 1940, and publicity was given to the results of this election in the union bulletin as well as in the Fairfield newspapers. Thereafter, Production Manager Baker approached Arline Potts, temporary recording secretary of the International, at her machine,

[4] Forelady Shehorn, also, openly expressed to Mrs. Elliott her disapproval of the International, telling her, "I think it is all hooey and ought to be stopped" (B. A. 347–348; B. A. 56–57).

handed her a copy of the union bulletin naming the union officers and, after criticizing the president of the International and casting aspersions upon unions generally, warned that "if the Company kept losing money they would be compelled to close on account of the Union" (B. A. 346–347; B. A. 17, 40–42, 50–51, 238). In December, Production Manager Baker had a conversation with a group of International members in which he repeated his earlier threat that the plant would be closed because of the activities of the International (B. A. 347; B. A. 43–44).

Following Baker's threats that petitioner would not operate its plant at Fairfield if the employees joined the International, employee Clem Anthis took steps looking toward keeping that organization out of the plant. Early in December he appealed to the City Council of Fairfield to ban such activities, but was unsuccessful in this venture (B. A. 355–356; B. A. 206–209, 224–227). Later that month, at a party of non-union employees at which ways and means of "stopping the Union" were discussed, Anthis was delegated to consult an attorney for advice on this point (B. A. 355–356; B. A. 61–62, 85, 88–89, 176–177, 185–186, 194, 197–198, 202, 205).

On December 26, after another fruitless appeal to the City Council, Anthis sought the aid of the Chamber of Commerce "to keep the [Inter-

national] out" (B. A. 356; B. A. 208–209, 216). The Chamber of Commerce declined to help him and suggested that he consult an attorney. Anthis immediately arranged to meet Robert S. Brown, a local attorney, the next day, and procured the City Hall for a meeting of employees on the next night (B. A. 356; B. A. 209, 218). Anthis notified his fellow employees as they went to work on the morning of December 27 of the meeting to be held that night at the City Hall (B. A. 356–357; B. A. 219–221). Securing permission from his foreman to leave his work that morning, Anthis sought advice of Attorney Brown as to what "they could do to stop the A. F. of L." Informed that the employees could form "a union of their own," Anthis commissioned Attorney Brown to prepare the constitution and bylaws of such an organization (B. A. 356–357; B. A. 103, 209–210, 213–214, 215–216).

At the meeting that night, over which Anthis presided,[5] the employees, after hearing a speech by Brown antagonistic to the International and

[5] During the month of December, Anthis was allowed unusual freedom of action in petitioner's plant, frequently leaving his work without the permission of his foreman (B. A. 357–359; B. A. 107–109, 111–112, 114, 117, 119–120, 122–125). The Board found that this demonstrated to the employees that petitioner approved of his activities, and that he was acting on behalf of petitioner in working for the formation of The Better Union (B. A. 363, 365).

favorable to the formation of a rival organization, adopted the constitution and bylaws of The Better Union, drafted by Attorney Brown (B. A. 357; 65–66, 78, 84, 89, 179–180, 193, 195–196). Foremen Musgrave and Humphrey and Foreladies Shehorn and Schumacher, petitioner's entire supervisory force with the exception of General Manager Leary and Production Manager Baker, were present throughout this meeting (B. A. 357; B. A. 63, 87, 89, 196). The foremen and foreladies continued to attend meetings of The Better Union at least through April 1941 (B. A. 359, 362; B. A. 90–91, 181, 236, 194, 244–246, 255, 272–273).

On January 2, 1941, a local newspaper published an article in which the formation of The Better Union was frankly attributed to the fear of the employees that petitioner would cease operations at Fairfield if the International succeeded in organizing the plant (B. A. 359–360; B. A. 329).[6] Although General Manager Leary read the article, he admittedly did nothing to refute its coercive implications, but merely sent a copy on to Flamberg, petitioner's president, in New York

[6] This article stated (B. A. 329):

"Knowing the history of the Aintree plant that they will not operate where unions are organized and observing obvious moves of the plant toward the closing of the factory here, the employees decided to meet and see what, if anything, could be done to stop the move of the union organizers—thus protecting their jobs."

City (B. A. 360; B. A. 273–275). Flamberg, after a few days, prepared a notice stating that petitioner was disinterested in the employees' choice of unions, but this notice was not brought to the employees' attention until it was posted on petitioner's bulletin board on January 13, 1941, at least 2 weeks after The Better Union had secured the adherence of a majority of the employees (B. A. 360–361, 366; B. A. 320–322, R. A. 231–236). About this time President Flamberg came to Fairfield and instructed petitioner's foremen and foreladies not to interfere in union matters and posted a further notice requiring all of its employees, including foremen, under penalty of immediate dismissal, to cease making statements which could be interpreted as reflecting the position of the company (B. A. 361–362; B. A. 187, 248–249, 322–323).

The Board found that these protestations of neutrality and similar assurances earlier given representatives of the International[7] "were not effective in giving assurance to the employees that [petitioner] was in fact impartial" for the reason that they were too long delayed and for the further reason that petitioner's supervisory officials thereafter did not adhere to the neutral position proclaimed by President Flam-

[7] These assurances were given on December 10, 1940, when representatives of the International conferred with President Flamberg concerning the discharge of Mina Hale (B. A. 351, 352, 355, 367; B. A. 115–116, see *infra*, pp. 9–10).

berg (B. A. 363, 367). The Board therefore concluded that petitioner had prevented the employees from exercising "that freedom of self-organization guaranteed under the Act," thereby engaging in unfair labor practices within the meaning of Section 8 (2) and (1) of the Act (B. A. 367).

Early in December 1940, upon Production Manager Baker's recommendation, petitioner discharged Mina Hale, the mother of Mrs. Shaw, the president of the International (B. A. 350–351; B. A. 24, 127, 138–139), whom Baker had previously criticized (*supra*, pp. 4–5). Mrs. Hale, employed by petitioner since 1932, had joined the International in October, had regularly attended its meetings, and had been open in her advocacy of the organization (B. A. 348, 350; B. A. 126, 127, 156, 137–138). The only explanation offered by petitioner was that Mrs. Hale had been "laid off" because she allegedly had an excessive amount of "make up" (B. A. 351–352; B. A. 139, 140–141, 253, 301).[8] This explanation is demonstrably false according to petitioner's own production records, which show that, instead of having the next to

[8] Petitioner's production employees, although generally paid on a piece-rate basis, must be paid the minimum wages required by the Fair Labor Standards Act (B. A. 349; B. A. 129, 232, 257–258). When an employee on a piece-rate basis fails to earn the minimum wage at the rate provided, the difference, or "short" amount, is "make-up" paid by petitioner (B. A. 35, 257–258).

the highest amount of "make-up," as claimed by petitioner, Mrs. Hale in fact had next to the lowest amount of "make-up" of the five employees upon her operation (B. A. 352; B. A. 324–328). Mrs. Hale was never reinstated although petitioner subsequently required the services of operators doing work she had formerly done (B. A. 352–353; B. A. 323–324, 161, 165). The Board found that petitioner had not merely laid off Mrs. Hale, but had discharged her in order to discourage membership in the International, thereby engaging in an unfair labor practice within the meaning of Section 8 (3) and (1) of the Act (B. A. 355).

The Board's order directed petitioner to cease and desist from discouraging membership in the International, dominating, interfering with, and supporting The Better Union, and in any other manner interfering with the rights guaranteed in Section 7 of the Act; to reinstate Hale with back pay; to withhold recognition from The Better Union; and to post the usual notices (B. A. 369–371).

Thereafter, the Board filed in the court below a petition for enforcement of its order. On November 12, 1942, the court handed down its opinion (R. A. 321–333), and on December 4, 1942, entered its decree (R. A. 336–338), enforcing the Board's order in full.

ARGUMENT

1. While questioning the substantiality of the evidence supporting the Board's findings generally, petitioner primarily[9] objects to the Board's findings concerning the attendance of its foremen and foreladies at meetings of The Better Union, contending that the Board erroneously gave weight to these findings in reaching its conclusions (Pet. 2, 3, 17, 19, 23–25). Even if this were correct, the Board's order is adequately supported by the findings as to the activities of Production Manager Baker, Forelady Shehorn, and Anthis, set forth in the statement, *supra,* pp. 4–8. The abstract question as to the rights of foremen to attend union meetings of their subordinates without causing their employer to violate the Act is thus not before the Court.

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[9] Petitioner also challenges the sufficiency of the evidence as to the reason for the discharge of Mrs. Hale. That the Board's order in this respect was valid is shown by the facts set forth in the Statement, *supra* (pp. 9–10). The circuit courts of appeals have uniformly regarded the fact that an employer advances a specious explanation for a discharge or lay-off as a significant factor on the issue of anti-union discrimination. *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 786 (C. C. A. 8); *N. L. R. B.* v. *Clarksburg Publishing Co.*, 120 F. (2d) 976, 982 (C. C. A. 4); *N. L. R. B.* v. *Botany Worsted Mills*, 106 F. (2d) 263, 268 (C. C. A. 3); *N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. (2d) 532, 536 (C. C. A. 4); *Kansas City Power and Light Co.* v. *N. L. R. B.*, 111 F. (2d) 340, 354–355 (C. C. A. 8); *N. L. R. B.* v. *New Era Die Co.*, 118 F. (2d) 500, 506 (C. C. A. 3); *N. L. R. B.* v. *Yale & Towne Mfg. Co.*, 114 F. (2d) 376, 378 (C. C. A. 2).

Moreover, in view of this background, it certainly was not improper for the Board to consider the coercive effects of the continued attendance of petitioner's foremen and foreladies at meetings of The Better Union in reaching its conclusions. The foremen and foreladies were the principal point of contact between the employees and the management (B. A. 364; B. A. 38). Foreman Musgrave was in charge of the cutting room in which 7 or 8 employees worked (B. A. 19–21); Foreman Humphrey directed the work of approximately 18 employees in the pressing and box department (B. A. 26); and Foreladies Shehorn and Schumacher had charge of between 150 and 175 employees in the stitching department (B. A. 23–25, 235–236, 276). The foremen and foreladies possessed and frequently exercised the power to recommend employees for hiring and discharge (B. A. 365; B. A. 20–22, 23–28, 31–32, 235–236). Thus, the employees had "just cause to believe" that the foremen and foreladies "were acting for and on behalf of the management," and the Board was justified in weighing their action in attending meetings of The Better Union in determining whether the employees had "the complete and unhampered freedom of choice which the Act contemplates." *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80; *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 599.

The attendance of the foremen and foreladies at meetings of The Better Union obviously indicated to their subordinates the preference of the management for The Better Union, since the supervisors were management officials exercing managerial functions. Any possible ambiguity in their conduct was dispelled by the contrast between the reception which the management accorded the respective organizing drives of the International and The Better Union.

There is no conflict between the decision of the court below and the decision of the Eighth Circuit in *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667, as petitioner urges (Pet. 17, 24).[10] The latter case merely holds that under the circumstances there presented a supervisory employee was an employee within the meaning of Section 2 (3) of the Act, and therefore was entitled to the protection which the Act affords employees against discharges because of union activities.[11] But the fact that an em-

[10] *N. L. R. B.* v. *Luxuray, Inc.*, 123 F. (2d) 106 (C. C. A. 2), which petitioner also asserts is in conflict with the decision of the court below (Petition, pp. 17, 25), is totally inapposite. The *Luxuray* case does not involve a supervisory employee but merely an ordinary production employee who, for a few months before she joined the union, had temporarily acted as forelady. See *Matter of Luxuray, Inc.*, 16 N. L. R. B. 37, 42–43.

[11] The *Skinner & Kennedy* case is similar to numerous other cases in which supervisory employees were coerced in exercising their rights of self-organization. Cf. *N. L. R. B.* v. *Remington-Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), certi-

ployer may not discriminate against supervisory employees who exercise their own rights of self-organization in a way not shown to coerce their subordinates has no bearing upon the issue whether coercion has, in a wholly different case, been visited by supervisors upon their subordinates. This is suggested in the *Skinner & Kennedy* opinion itself (113 F. (2d), at 671). And in *N. L. R. B.* v. *Christian Board of Publication,* 113 F. (2d) 678, 682, decided the same day as the *Skinner & Kennedy* decision, the Eighth Circuit held the employer responsible for the activities of its supervisory employees in support of an "Employees Committee" despite the employer's claim that the supervisory employees were eligible to membership in the "Employees Committee" and therefore "were entitled actively to participate in the promotion of the Employees Committee." This decision rejecting the precise contention made by petitioner in this case completely eliminates any question of a conflict between the

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orari denied, 304 U. S. 576; *N. L. R. B.* v. *Star Publishing Co.*, 97 F. (2d) 465, 467 (C. C. A. 9); *N. L. R. B.* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18, 23 (C. C. A. 9); *N. L. R. B.* v. *American Potash and Chemical Corp.*, 98 F. (2d) 488, 493–494 (C. C. A. 9), certiorari denied, 306 U. S. 643; *Eagle-Picher Mining and Smelting Co.* v. *N. L. R. B.*, 119 F. (2d) 903, 911–913 (C. C. A. 8); *N. L. R. B.* v. *Condenser Corp.*, 128 F. (2d) 67, 74–75 (C. C. A. 3); *N. L. R. B.* v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130, 132–133 (C. C. A. 3) (domination and interference with Captains and Deck Hands Committee).

holdings of the Eighth Circuit and the court below on this point. Cf. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 81; and *N. L. R. B.* v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780, 788 (C. C. A. 9).

2. Petitioner contends (Pet. 3, 17–18, 23, 25–27) that the Board erred in failing to require petitioner to include in the notice to be posted under paragraph 2 (d) of the order (B. A. 371), in addition to the statement that its employees are free to become or remain members of the International and that it will not discriminate against any employee because of membership or activity in that organization, the further statement that the employees are free to join any union they choose. This contention is without merit. Petitioner's discriminatory conduct put the employees upon notice that they were not free to join a particular labor organization, the International. In this situation it clearly was not an abuse of the Board's discretionary power to determine "how the effect of prior unfair practices may be expunged" [12] to direct petitioner to notify its employees without more that they are now free to join and remain members of the particular organization which was the target of petitioner's unfair labor

[12] *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 82; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 600.

practices. While several of the circuits courts of appeals [13] have in particular factual situations required the inclusion in the Board's notices of an additional clause of the kind requested by petitioner, these courts have, in subsequent decisions, enforced provisions identical with the ones here in controversy.[14] This indicates that these courts have adopted no hard and fast rule, but vary their decision according to the facts presented and even if regarded as conflicting, the numerous minor changes made by the courts in the wording of the notices required to be posted would not raise issues of sufficient importance to warrant the granting of writs of certiorari.

3. Petitioner urges (Pet. 2–3, 18, 23, 27–30) that the provision of the order which restrains

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[13] *Westinghouse Electric & Mfg. Co.* v. *N. L. R. B.*, 112 F. (2d) 657, 661 (C. C. A. 2), affirmed per curiam 312 U. S. 660; *N. L. R. B.* v. *Baldwin Locomotive Works*, 128 F. (2d) 39, 51 (C. C. A. 3); *N. L. R. B.* v. *American Rolling Mill Co.*, 126 F. (2d) 38, 42 (C. C. A. 6); *Cudahy Packing Co.* v. *N. L. R. B.*, 102 F. (2d) 745, 753 (C. C. A. 8).

[14] See, for example, *Greenport Basin and Construction Co.* v. *N. L. R. B.*, decided January 19, 1943 (C. C. A. 2), 11 L. R. R. 717, enforcing 42 N. L. R. B. 377, 403; *Marlin-Rockwell Corp.* v. *N. L. R. B.*, decided January 28, 1943 (C. C. A. 2), 11 L. R. R. 762, enforcing 39 N. L. R. B. 501, 529; *N. L. R. B.* v. *Ohio Fuel Gas Co.*, decided December 17, 1942 (C. C. A. 6), 11 L. R. R. 717, enforcing 35 N. L. R. B. 1128, 1144; *N. L. R. B.* v. *Swift & Co.*, 129 F. (2d) 222 (C. C. A. 8), enforcing 30 N. L. R. B. 550, 583; *Gamble-Robinson Co.* v. *N. L. R. B.*, 129 F. (2d) 588 (C. C. A. 8), enforcing 33 N. L. R. B. 351, 367.

petitioner from in any manner interfering with its employees in the exercise of the rights guaranteed in Section 7 of the Act is invalid under the principles enunciated in *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436). In that case the sole unfair labor practice was an isolated refusal to bargain. In this case petitioner engaged in numerous practices, including interrogation of employees as to union matters, disparagement of unions and union organizers, veiled threats of discharge, and threats that the plant would be closed because of union activities, which came squarely within the prohibition of Section 8 (1) of the Act. This circumstance in and of itself suffices to support the Board's order. Moreover, this case involves violations of Section 8 (2) and (3) of the Act and thus furnishes ample basis for the belief that other violations might occur unless restrained—a second sufficient ground for the broad type of order. Provisions like the one here in controversy were enforced in *N. L. R. B.* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282; *N. L. R. B.* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that raised by petitioner were made by the employers and rejected

in *Owens-Illinois Glass Co.* v. *N. L. R. B.*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *N. L. R. B.*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *N. L. R. B.* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1943.